Appellant also contends that the district court should have made provision in the judgment against acceptance of an excessively low bid at foreclosure sale. It does not appear from the record before us that this issue was raised in the district court. In any event, we agree with appellee that "all that is before the Court now is the Judgment of Foreclosure and Order of Sale, not the sale itself." Nothing that the district court or this court has held would preclude the appellee from seeking relief in the district court on a showing that the high bid at the foreclosure sale was unreasonably low. *Cf. Magnolia Springs Apartments, Inc.* v. *United States*, 323 F.2d 726 (5th Cir. 1963).

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

Civil No. 7735

UNITED STATES OF AMERICA, *Plaintiff*,

v.

HERLONG-SIERRA HOMES, INC., a corporation; WESTERN TITLE INSURANCE AND GUARANTY COMPANY, a corporation; JOHN DOE I, JOHN DOE II, JOHN DOE III, JOHN DOE IV, JANE DOE I, JANE DOE II, JANE DOE III, JANE DOE IV, DOE CORPORATION I, DOE CORPORATION II, DOE CORPORATION III, AND DOE CORPORATION IV, *Defendants*.

Memorandum and Order

The United States brought this action, under Title 28 U.S.C. § 1345, to foreclose a deed of trust held by the Federal Housing Authority (hereinafter referred to as FHA). The deed of trust secures a note in the amount of $1,113,700.00 given by Herlong-Sierra Homes, Inc. (hereinafter referred to as defendant). The amount represents

a loan acquired by defendant for the purpose of financing the construction of a rental housing project for military and civilian personnel at Sierra Ordnance Depot, a federal enclave located in an isolated area of Lassen County, California.

Negotiations leading to the financing of defendant's project were made pursuant to the authority of the National Housing Act of 1934 (Title 12 U.S.C. § 1702), and of the Act of August 8, 1949, known as the "Wherry Act" (Title 12 U.S.C. § 1748 *et seq.*). Because of a housing shortage existing at the Depot, its Commanding Officer requested the construction of some 456 dwelling units to house civilian and military personnel employed at the Depot, and the request was approved by the Headquarters of the Sixth Army and by FHA. Negotiations were carried on among the Department of Defense, FHA, and Housing and Home Finance Agency (HHFA, also a Federal agency) to obtain the construction of these units. The negotiations resulted in the issuance by the Defense Department, on October 24, 1951, of a certification to FHA that 125 units were necessary to provide adequate rental housing for Depot personnel; that the Depot was deemed a permanent installation; and that there was no present intention to substantially curtail activities at the Depot. Defendant filed application, received approval, and undertook the construction of these units.

On March 3, 1955, defendant executed and delivered to the Manufacturers Trust Company its note, secured by a deed of trust on lands leased to defendant by the United States upon which the housing units were to be constructed together with the housing units thereafter constructed on the property. Repayment of the loan was insured by FHA, which is now the holder of the note and the deed of trust by assignment. Defendant has defaulted in payments due under the note, and the United States has consequently instituted this action to foreclose the deed of trust.

Although the matter has not been pressed in subsequent arguments, defendant originally raised the defense that certain alleged acts of plaintiff made it impossible for defendant to make the payments on the note. Defendant contends that its duty to make the payments was thereby excused and that plaintiff is thereby estopped to bring the present action. The alleged acts of plaintiff were as follows: (1) that through its duly authorized agents and employees, plaintiff precluded military and civilian personnel from occupying the dwelling units of the project constructed by defendant; and (2) that FHA reduced rents for tenants in a nearby project (hereinafter referred to as Title IX units) and thereby enticed tenants away from the project constructed by defendant.

Specifically, the acts of the agents and employees of the Government referred to by defendant in its first contention are those of Colonel Leavitt (the Commanding Officer of the Depot) and his staff. These actions were the subject of another suit brought by defendant and Builders Corporation of America in this Court under the Federal Tort Claims Act (*Builders Corporation of America* v. *United States,* Civil No. 7250, affirmed in 320 F.2d 425).

Defendant's contention that tenants were enticed from its project by the reduction of rents in the Title IX units is simply not borne out by the record. FHA reduced the rents on the Title IX units sometime after April 20, 1956. The record shows that the occupancy of the defendant's units had dropped steadily in the ninth month period immediately preceding FHA's decision to lower the rents on the Title IX units. Defendant has introduced no evidence to indicate that the drop during the period from April, 1956, to August, 1956, was not a continuation of the decline which was occurring long before Title IX rents were reduced. Furthermore, there is no showing that those tenants leaving defendant's project moved into the Title IX units.

It is a general rule that if a promisor prevents the performance of a condition or promise which would have been performed except for such prevention or hindrance, the condition is excused (*United States* v. *Peck*, 102 U.S. 64; 3 Williston on Contracts § 677, pp. 1952, 1955; and Restatement of Contracts, § 295).

The general rule, however, is subject to certain exceptions. The rule does not apply when under the contract or the customs of business the risk of such prevention or hindrance as occurs is assumed by the other party (*Iron Trade Products Co.* v. *Wilkoff Co.*, 272 Pa. 172; 3 Williston on Contracts § 677, p. 1956; and Restatement of Contracts § 295(b)).

The Court has found nothing wrongful in the acts of Colonel Leavitt and his staff (See this Court's Memorandum and Order of July 5, 1962, in *Builders Corporation of America* v. *United States, supra*). Furthermore, the Government owed defendant no contractual duty to supply tenants for its housing project (See: *Henry Barracks Housing Corp.* v. *United States*, 281 F.2d 196).

Defendant went into this transaction with its eyes open. It was entirely foreseeable that the Depot Commander, in the exercise of his sound discretion and in compliance with orders, might refuse to give total support to defendant's project. Defendant must be deemed to have assumed the risk of the actions taken by Colonel Leavitt and his staff insofar as they may have tended to preclude occupancy of defendant's units. The Wherry Housing Act gives certain advantages to builders for the purpose of encouraging private investors to engage in the construction of rental housing for civilian and military personnel at military installations, but in no way does the Act attempt to relieve the builder of the burden of occupying its housing units. As stated in the *Henry Barracks* case, *supra*, at p. 201:

> "While the risk of loss from default was substantially shifted from the financing institution to the Government, thus enabling builders to more readily obtain financing for the contemplated housing, whether the project would continue to be profitable still involved a certain degree of gamble by the landlord on adequate occupancy, which is true of the operation of any rental real property."

The general rule excusing a condition when acts of the promisor have hindered or prevented its occurrence is subject to another exception which has application to the instant case. The general rule does not apply when "the prevention or hindrance by the promisor is caused or justified by the conduct or pecuniary circumstances of the other party" (Restatement of Contracts § 295(a)).

Colonel Leavitt's actions were motivated, in this case, by his feeling that there were certain structural deficiencies in the buildings. The Court is satisfied from the evidence adduced on this matter that Colonel Leavitt's actions were justified by actual deficiencies in the construction of defendant's buildings. Hence, defendant was not relieved of its duty to perform by plaintiff's actions.

Defendant raises the further defense that a deficiency judgment is precluded by California Code of Civil Procedure § 580(b).

It is unnecessary to determine whether under California law plaintiff would be entitled to a deficiency judgment. Federal law, rather than California law, must determine this question (See: *Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *United States* v. *Standard Oil Co.*, 332 U.S. 301; *McKnight* v. *United States*, 259 F.2d 540; and *United States* v. *View Crest Garden Apartments, Inc.*, 268 F.2d 380). The authority to insure payment on a note arose under the Constitution and statutes of the United States and was in no way dependent on the state laws.

In *McKnight* v. *United States, supra,* the Government brought suit against a veteran to recover a sum of money on a Loan Guarantee which the defendant had executed in connection with a loan for the purpose of purchasing a home. Defendant contended that the action was one for a deficiency judgment and hence barred by California Code of Civil Procedure § 580(b). The Court of Appeals (9th Cir.) held that the subject matter of the litigation arose under federal law and that the state statute was therefore not controlling.

Defendant contends that the Court should select the state rule as the applicable federal rule for this situation. However, in *McKnight* the Court refused to adopt the state anti-deficiency statute as the federal rule in a substantially similar situation. In *United States* v. *View Crest Garden Apartments, Inc., supra,* the Court restated its position in *McKnight* as follows, at p. 383, footnote 2:

> "This court . . . held that a local statute prohibiting deficiency judgments could not impair that remedy as far as the mortgage insured by the United States is involved."

State law has occasionally been selected as the applicable federal rule (See: *Royal Indemnity Co.* v. *United States,* 313 U.S. 289). Such a determination involves weighing the federal interest against the local policy (*United States* v. *View Crest Garden Apartments, Inc., supra*).

It is the federal policy "to protect the treasury and to promote the security of federal investment which in turn promotes the prime purpose of the (National Housing) Act—to facilitate the building of homes by use of federal credit. . . ." (*United States* v. *View Crest Garden Apts., supra,* at p. 383). On the other hand, the California Supreme Court has declared the state policy of the anti-

deficiency legislation to be as follows (*Bargioni* v. *Hill*, 59 Cal. 2d 121, 123):

> "The purposes are to discourage land sales that are unsound because the land is overvalued and, in the event of a depression in land values, to prevent the aggravation of the downturn that would result if defaulting purchasers lost the land and were burdened with personal liability."

This Court is of the view that the state's purposes are outweighed by the federal policy as it is stated in *View Crest Garden Apts.* and by the need for a uniform rule determining the Government's rights and duties on federally insured mortgages throughout the several states (Cf. *Clearfield Trust Co.* v. *United States, supra*). Accordingly, the federal rule entitles plaintiff to a deficiency judgment.

In light of the stipulation filed in this case on May 22, 1964, the Court makes no decision on the counterclaim asserted by defendant.

Let judgment be entered in favor of the plaintiff in this action. Plaintiff will prepare findings of fact and conclusions of law, a form of judgment, and all other documents necessary for the final disposition of this case in accordance with this Memorandum and Order and lodge them with the Clerk of this Court in accordance with the applicable rules and statutes.

DATED: June 8, 1964.

SHERRILL HALBERT
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,764

HERLONG-SIERRA HOMES, INC., a corp., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Judgment

APPEAL from the United States District Court for the Northern District of California, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 24, 1966